



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.112 OF 2013

PHILIP NJOROGE NGUGI (*Suing as guardian ad litem of*

FRED RAMON NGUGI NJOROGE).....**PLAINTIFF/APPLICANT**

VERSUS

CHARLES JOHN MUSEE.....**DEFENDANT/RESPONDENT**

RULING

The plaintiff has moved this court by way of a Notice of Motion dated the 21st day of February, 2018 under orders 45, 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A, and 27 of the Civil Procedure Act seeking orders that:

(1) *Spent*

(2) *This Honourable court be pleased to interpret and rule on the judgment delivered by Honourable Justice L. Njuguna on the 20th day of December, 2017 and more specifically on the issue of interest on the general damages payable to the Applicant herein.*

(3) *The judgment of the Honourable Justice L. Njuguna delivered herein on 20th December 2017 be reviewed so as to grant the Applicant an award for future medical expenses.*

(4) *The cost of this Application be provided for.*

It is premised on the grounds set out on the body of the same and supported by the affidavit of Patrick Kimathi Muchene Advocate sworn on the 21st February, 2018.

In the said affidavit, it is deponed that, judgment in the matter herein was delivered on 20th day of December, 2017 in which the court awarded General damages for pain and suffering at Kshs.10,000,000; special damages and doctor's attendance at Kshs.6,948,382 and Kshs.20,000 respectively.

It is averred that, in the further amended plaint dated the 21st April, 2016, the plaintiffs sought special damages, general damages, future medical expenses, together with interest at court rates from the date incurred until payment in full.

That the applicant humbly believes that the order on costs contained in the judgment includes interest on general damages as was requested in the plaint and has asked the court to interpret the judgment on the issue of interest on general damages to be paid to the plaintiff.

Further, the plaintiff having pleaded future medical expenses in the amended plaint, dated the 21st April 2016 the same ought to have been awarded as particularized in the submissions dated the 9th November, 2016.

The Defendant/Respondent filed grounds of opposition dated the 6th April 2018.

The application is opposed on the following grounds;

- a) That there has been unreasonable and unwarranted delay on the plaintiff's part in seeking review of the judgment in breach of Order 43 Rule 1 and the defendant should not suffer for it.
- b) That the court considered the evidence on record and the submissions by the Defendant and found that the claim for future medical expenses was not pleaded.

- c) That the Defendant is asking the court to make a decision that is tantamount to making an Appeal on its own decision which is judicially not possible.
- d) That the court properly considered the evidence on record on special damages and specifically that the plaintiff only adduced evidence on medical expenses having been incurred upto 2012 and therefore the same cannot be awarded as they are not specifically pleaded and proved as required under the law.
- e) There is no mistake or error that is apparent on the face of the record and there is no sufficient reason to warrant a review of its judgment.
- f) This court is enjoined by Article 159(1) of the Constitution to ensure just and fair trial and in the absence of sufficient reason and any mistakes or error on the court record, the plaintiff's application must fail.
- g) That the application is prejudicial to the Defendant and the same must fail.

In his submissions, counsel for the plaintiff/applicant submitted that the court ought to review the judgment for the reasons that when the court granted special damages, it specified the same should earn interest from the date of filing of the plaint but made no specific order on interest on general damages which must have been an oversight on the part of the court.

It was further submitted that in the judgment, the court stated that the plaintiff did not plead future medical expenses which must have been an error in that the same is pleaded in the further amended plaint dated the 28th July 2014 and in particular prayers (b) of the amended plaint. Further there is a doctor who testified on future medical expenses and therefore, future medical expenses were pleaded and proved.

On the part of the Defendant/Respondent, it was submitted that there has been unreasonable delay in bringing the application herein and the same has not been explained, judgment having been delivered on 20th December, 2017 and the application was filed on 21st February, 2018. It was averred that the only evidence produced by the plaintiff for future medical expenses is upto 2012 and admitted that he did not have any evidence to show what other medical expenses he will incur. That special damages have to be pleaded and proved and the court cannot grant future medical expenses open ended. It was further submitted that the prayer for future medical expenses was not put on the body of the plaint and its highly prejudicial to the Defendant to allow a prayer that was not defended by the Defendant. That there was no error or mistake apparent on the record to necessitate review of the judgment of the court and that no sufficient reason has been given by the plaintiff to support the application.

The court has considered the material before it including the submissions by the counsels for the respective parties. The application is brought mainly on the two grounds that the court did not make an order on interest on general damages and that no award was made on future medical expenses. Counsel for the plaintiff avers that the claim was pleaded in the further amended plaint amended on the 21st April 2016.

The application is opposed by the Defendant and I have considered all the material before me.

Review is provided for under Order 45 of the Civil Procedure Rules Cap. 21 Laws of Kenya. An applicant who wishes the court to review its judgment has to prove that there is a mistake or error that is apparent on the face of the record or that there is a sufficient reason to warrant a review of the judgment.

The applicant claims that future medical expenses were pleaded and proved but the court did not make any award under this head. I have perused the further amended plaint amended on the 21st April 2016 and its true that there is a relief of future medical expenses that is sought. The plaintiff has made a blanket prayer but has not provided the specifics in the body of the plaint. The court has carefully considered the evidence of PW1 and PW2 in regard to future medical expenses. The court has also keenly perused the documents availed to it. Of importance is the medical report of the plaintiff by Dr. Kiboi Julius Githinji dated the 12th September 2012. In the said report, the doctor opined that the plaintiff needs 24 hour nursing care and continuous physiotherapy, he is not able to do any activity by himself and is fed through a gastric tube and that he is on continuous medication for prevention of epilepsy and deep venous thrombosis. On cross-examination the said doctor who testified as PW1 stated that he is not able to quantify the future medical expenses.

The other relevant witness in this regard is PW2 Philip Njoroge Ngugi who is the father to the plaintiff. It was his evidence that the plaintiff shall require 24 hours nursing care along with physiotherapy, speech therapy and occupational therapy. That the plaintiff has to be reviewed every six months and every time he is reviewed, he is told he has to continue with nursing services.

On the 16th September 2015 when PW2 testified, Counsel for the plaintiff made an application for leave to file a supplementary list of documents which application was opposed by Counsel for the Defendant but the court granted the same vide a ruling dated the 1st day of October 2015. The said documents were filed on the 10th day of April, 2010. In cross-examination, PW2 stated that his son requires medication which continues to date but he did not produce documents to show that he is still being attended to by the doctor.

The court has perused the documents that were filed on 1st October 2015 they relate to expenses that had been incurred as at that time which follows under special damages. On the other hand, future medical expenses though a special class of special damages relates to future expenses but evidence has to be availed to court to guide it on how much to award.

In the supporting affidavit to the application, counsel has alluded to the fact that special damages ought to have been awarded as submitted in his submissions. The court has perused the said submissions and under future medical expenses the plaintiff prays for damages for physiotherapy, occupational therapy, speech therapy, home nursing as derived from the totals of May 2014 – August 2015 on pages 26, 27,

28 and 29 on the plaintiff's supplementary list of documents. The court was asked to take those figures and apply a multiplier of 40 and was asked to make an award of Kshs.106,191,872.20 under this head. With all due respect to the counsel for the plaintiff, I must say that it was not enough to just file documents and claim figures that did not have any basis. It was not shown in evidence how the claimed figure of Kshs.106,191,872.20 was arrived at and how much future medical expenses the plaintiff would require under the various categories under future medical expenses. With the documents availed to court and the evidence on record, it is not possible for the court to make any award under this head and therefore prayer 3 of the application must fail. However, on prayer 2, the court finds that there was an error in failing to order that general damages would earn interest from the date of the judgment. I do hereby clarify that general damages should earn interest from the date of the judgment.

In the end, the application partly succeeds as shown hereinabove.

No order is made on the costs of the application.

Dated, Signed and Delivered at Nairobi this **15th** day of **November, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**